that case, I examined the charge sheet and noted that it supported his statement on oath that although he was arrested on February 8, 1979, for possession of the firearm and ammunition, he was not produced in court and charged for offences relating to them under the ISA until October 19, 1981. In all the circumstances of that case, I felt and considered that the prosecution of the accused in 1981, that is, nearly three years after his arrest was some evidence of *mala fides* on the part of the prosecution and amounted to an abuse of the process of the court. As I also considered that it was oppressive and prejudicial to the accused, I therefore took the unprecedented step to intervene by amending the charges and sought support in the following passage in the judgment of Lord Salmon in the House of Lords' case of *Director of Public Prosecutions* v. *Humphrys*[10]:-

"I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considered that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred. I express no concluded view whether courts of inferior jurisdiction possess similar powers. But if they do and exercise them mistakenly, their error can be corrected by mandamus."

But I must agree with the learned deputy in this case that I had erred in that case by amending the second charge of possession of ammunition to a charge under the Firearms (Increased Penalties) Act rather than to charge under section 8 of the Arms Act, 1960. However the facts and circumstances of *Tan Ah Hock's* case are different from those in the present case, in which the accused was charged only two months after the date of his arrest, and there is no evidence of circumstances to show that he has been treated unfairly or oppressively as the accused was, in the other case. With respect, therefore, to the submissions of learned counsel, I therefore considered that the question posed by him need not be answered in this case.

No one need go beyond *Johnson Tan Han Seng's* case to find the authority that the Attorney-General has the power to discriminate between persons alleged to be in possession of firearms or ammunition and to charge them differently. I would again quote the following passage from the judgment of Suffian L.P. (as he then was) in that case:-

"The Attorney-General is in touch with the police and other investigating agencies, and he has information not available to the courts and on which to base his decision whether or not to prosecute and if so on which charge."

As the law stands it must therefore be left to the discretion of the Attorney-General in his capacity as the Public Prosecutor to decide what charges to bring against anyone found in possession of firearms or ammunition and, in the exercise of his discretion and in good faith, never to charge any person under section 57(1) of the ISA whose case does not come within the legislative intent and purpose of that Act.

As far as this case is concerned, having considered very carefully the evidence adduced by the prosecution and the defence, I was satisfied beyond reasonable doubt that the accused was guilty of the offences charged and convicted him accordingly. I then proceeded to pass the only sentence provided under section 57(1) of the ISA, namely death.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

JASABENA SDN. BHD. v. BEH HENG POO & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) July 7 & August 18, 1984]
[Penang – Originating motion No. 1 of 1984]

Practice and Procedure – Certiorari – Construction of words "entered for hearing" – Preliminary objection – Notice to opponent – R.H.C. 1980, O.53 r.1A & 2(2).

In this case the sole question for decision arising out of a preliminary objection taken by the respondents concerned the meaning and ambit of the phrase "entered for hearing" in O.53 r.2 of R.H.C. 1980. After leave has been granted, the motion under O. 53 r. 2(2), must be entered for hearing within 14 days. In this case, the application for *certiorari* was fixed for hearing 52 days after leave was obtained.

Held: for purposes of O. 53 r. 2(2), "filing" corresponds to "entry" so that there is sufficient compliance

once the applicant files his application within 14 days after leave has been granted. Alternatively, if there has been a breach of O. 53 r. 2(2) by the Applicant, the Court would regard its requirements as purely directory and therefore capable of being condoned under the provisions of O. 2 r. 1(1).

Obiter dictum: It was unfortunate that counsel for the respondents did not give prior notice to his opponent when raising the preliminary objection.

Cases referred to:

(1) *Gooi Seang Tuck* v. *Tan Peng Loon & Anor.* [1959] M.L.J. 153.
(2) *Pratap Singh* v. *Shri Krishna* [1955] 2 SCR 1029; AIR 1956 SC 140; [1956] SCJ 143.
(3) *Punjab Co-operative Bank Ltd., Amritsar* v. *C.I.T., Lahore* 67 IA 464; AIR 1940 PC 230; (1941) 1 Mad. LJ 130.
(4) *Gurbachan Singh* v. *Seagrott & Campbell* [1962] M.L.J. 370.

ORIGINATING MOTION.

C.V. Das (*Gan Teik Chee* with him) for the applicant.

R. Rajasingam (*Cecil Rajendra* with him) for the 1st respondant.

Cur. Adv. Vult.

Edgar Joseph Jr. J : The sole question for decision by the Court here concerned the meaning and ambit of the phrase "entered for hearing" in O. 53 r. 2 of the *Rules of the High Court, 1980.*

The question arose on a preliminary objection taken by the Respondents to an Application for an Order of Certiorari to remove into this Court for the purpose of it being quashed the award of the Industrial Court of Malaysia being, No. 240/83 dated November 25, 1983, on the ground of a breach of the rules of natural justice.

Although the point taken is an extremely technical one and without any merit, if it is correct, the Respondents are entitled to succeed and the motion will have to be dismissed *in limine.*

The starting point is, of course O. 53 r. 2 which provides as follows:

"(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application for such order must be made by originating motion to a Court, except in vacation when it may be made by originating summons to a Judge in Chambers, and, unless the Court or Judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion or summons and the day named therein for the hearing.

(2) *The motion must be entered for hearing within 14 days after such leave was granted.*

. . . . . ."
(emphasis supplied)

It was submitted that although the Applicant obtained leave under O. 53 r. 1A on January 13, 1984 in time and lodged the Application for *certiorari* four days thereafter, it was not fixed for hearing until April 6, 1984 that is to say, 52 days after leave was obtained and that therefore there was a breach of the requirements of O. 53 r. 2(2).

It was said that it was the responsibility of the Solicitors for the Applicant to have ensured that the motion was entered for hearing within the time limited and that this could have been done had they been more diligent. It was also said that as the Court had no power to enlarge time at this stage it had no option but to dismiss the Application.

I have considered the judgment of Rigby, J. in *Gooi Seang Tuck* v. *Tan Peng Loon & Anor.* (1) which concerned the procedure governing appeals from decisions of the Registrar to a Judge in Chambers. I do not consider it of any relevance to the issue raised here because in that case everything depended upon the interpretation of O. 54 r. 21 of our old *Rules of the Supreme Court, 1957,* which, omitting immaterial parts, reads as follows:

"Any person affected by any order or decision of a Registrar may appeal therefrom to a Judge at Chambers. Such appeal shall be *by notice in writing to attend before the Judge* without a fresh summons, *within five days after the decision complained of,* or such further time as may be allowed by a Judge or Registrar. Unless otherwise ordered there shall be at least one clear day between service of the notice of appeal and the day of hearing. ..."
(emphasis supplied)

In his judgment, Rigby, J. said:

"As a matter of practice, however, it is as well that advocates and solicitors should note that the primary responsibility rests with them to ensure that the notice of appeal in such matters should not only be taken out but also be made returnable within the period of five days. I think the most suitable course for Counsel to ensure that the notice of appeal is returnable within the period of five days would be to request the Registrar to include it in the List (if need be, only for mention) for one or other of the days for the hearing of Chamber matters, namely, Mondays or Fridays."

I can find no warrant for equating the words "entered for hearing" in the current O. 53 r. 2(2) with the words "Such appeal shall be by notice in writing to attend before the Judge... within five days after the decision complained of ..." in the old O. 54 r. 21. Clearly, the two provisions are as unlike each other as cheese is from chalk.

The commentary in the *U.K. Annual Practice, 1957,* on the then O.36 r.16 at pp. 603-605, commencing under the heading "The trial shall be entered" and onwards is, however, helpful.

According to this, in the Chancery Division, entry is effected by leaving a copy of the notice of trial together with two copies of the pleadings and the writ and a praecipe impressed with the fee of two pounds.

In the Queen's Bench Division, entry is effected by leaving a copy of the Order for entry and two copies of the whole of the pleadings. The pleadings are then stamped with the entry fee; any other order for directions and a copy of the particulars and of the order giving leave for particulars should also be included in the unstamped copy of pleadings.

In the Admiralty Division, the papers required for entry are notice of trial, (fee of £2 impressed), printed pleadings and a praecipe (a fee of 10s. impressed).

I consider that to require the Applicant to obtain a date for hearing within fourteen days of leave having been granted may pose insuperable problems to an applicant where, for example, no Judge is available to hear the application. The suggestion that this problem may be overcome by obtaining a date for hearing within the stipulated fourteen-day period notwithstanding the non-availability of a Judge and then having the application adjourned so as to comply with the requirement is in may view a pointless ritual serving no practical purpose and I have no hesitation in rejecting it.

It is my opinion, therefore, that for purposes of O. 53 r. 2(2) "filing" corresponds to "entry" so that there is sufficient compliance once the applicant files his application within fourteen days after leave has been granted.

Alternatively, if contrary to my primary opinion, there has been a breach of O. 53 r. 2(2) by the Applicant, then, I would regard its requirements as purely directory and therefore capable of being condoned under the provisions of O. 2 r. 1(1).

As was held by the Supreme Court in *Pratap Singh* v. *Shri Krishna*[2]

"We do not think that any failure to comply with any of the provisions set out in the various rules is fatal, and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues and when the legislature does not itself state which is which judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based common sense lines."

Similarly, in *Punjab Co-operative Bank Ltd., Amritsar* v. *C.I.T., Lahore*[3], Viscount Maugham referred to the same principle in these terms:

"It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

Moreover, the Respondents in this case had clearly waived their right to take the preliminary objection by filing affidavits in opposition and failing to give to the Applicant prior notice of their intention to raise the preliminary objection.

I would therefore dismiss the preliminary objection. The hearing of this application must proceed on its merits.

Before concluding, I have an observation to make, and it is this: Counsel for the Respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson, C.J. in *Gurbachan Singh* v. *Seagrott & Campbell*[4] that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.

I am now prepared to hear arguments as to costs.

Order accordingly.

Solicitors: *Gan Teik Chee & Ho; Subbiah & Co.*